Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Policies and Rules Concerning Children's Television Programming	)	MM Docket 93-48
Revision of Programming Policies For Television Broadcast Stations	)	

STATEMENT OF
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Respectfully Submitted,

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We are filing these comments to provide a fuller discussion of the constitutional questions and in response, in part, to the First Amendment analysis put forth by the National Association of Broadcasters ("NAB").[1] The Center for Media Education ("CME") provided us the NAB's comments and Professor Smolla's comments and encouraged us to participate in this important proceeding. The position herein stated, however, is our own; it does not necessarily reflect the views of the CME, and may in some respects be at variance with them.

I. THE PROPOSED GUIDELINES IMPOSE NO GREATER BURDEN THAN THE CHILDREN'S TELEVISION ACT, WHICH IS PRESUMPTIVELY CONSTITUTIONAL

As we see the issues that are properly before the Commission, the constitutional questions are not inordinately complex, and definitely not so terrifying nor so negative in their implications as the NAB has urged. There is a "sky is falling" tendency in the description of First Amendment law, as the NAB presents it, with the apparent hope of an in terrorem impact on decision-makers. It is possible to be so caught up in

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[1] A word as to "qualifications." Professor Price is the director of the Howard Squadron Program on Law, Media and Society at the Benjamin N. Cardozo School of Law and the co-author with Professor Meyerson (and Daniel Brenner) of "Cable Television and Other Non-Broadcast Video." His book, "Television, The Public Sphere and National Identity," was published by Oxford University Press this fall and he has written extensively on issues of broadcast regulation. Professor Meyerson has also written numerous articles on technology and the First Amendment, with articles appearing in Notre Dame Law Review, Harvard Journal of Law and Technology, Georgia Law Review, Washington & Lee Law Review, and Stanford Journal of International Law, among others. We acknowledge the generous advice of Professor Jonathan Weinberg of the law school of Wayne State University.

a hail of legal tests, technical and dense, that any regulatory step by the FCC meaningfully to implement the Children's Television Act ("CTA"), is seen as fraught with difficulty. A rat-a-tat array of cases and tests are spun out to distract the decision-maker from the quite narrow questions that are actually presented.

Here, for example, in this very proceeding, the choices that remain for decision are fairly straightforward and limited. On one side, there is no serious challenge to the constitutionality of the underlying CTA. The NAB does not attack the CTA's validity, and its constitutionality is not properly an issue for the Commission. See Johnson v. Robison, 415 U.S. 361, 368 (1974); Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987). And, given the duty of the FCC under the CTA to consider a licensee's record before granting a renewal, there hardly seems any dispute that the Commission's proposed "monitoring alternative" can present a significant constitutional question. See 47 U.S.C. § 303(a)(2) (requiring the Commission to consider, as part of renewal, whether the licensee "has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.") Furthermore, while the proposal for specific programming standards is contained in the Notice of Proposed Rule Making,[2] a majority of the Commission seems to have determined

[2] See Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rule Making, MM Docket No. 93-48, 19 FCC Rcd. 6308 at ¶ 18 (Apr. 5, 1995) ("Notice").

that it should not be adopted, at least at this time. Therefore, further comment on the constitutionality of such a proposal seems unnecessary.

We therefore focus on the middle alternative proposed in the Notice, namely the so-called "processing guidelines." Under that approach, the FCC proposes to create a "safe harbor": an indication of conduct that, if met, would suffice to establish compliance with the CTA and assure staff-level renewal of a license (as to compliance with the CTA). Other methods of performance would, of course, be available to meet the statutory standard and yield renewal. Based on the proposal, the exact same conduct by a broadcaster which would qualify under existing rules, would qualify under the guidelines.

Much, of course, depends on the nature of the processing guideline that is adopted. The Commission's inclination, as stated in the Notice, is to match the guideline to current practices, and set the safe harbor at three hours per week of "core" programming. From a constitutional perspective, it is helpful that this "safe harbor" reflects a minimal intrusion (since it underachieves the industry's sense of its own average). Indeed, the processing guideline could be viewed as reducing whatever intrusion is placed by the renewal review requirement of the CTA itself. Accepting the constitutionality of the statutory renewal review provisions, which the NAB does and the FCC must, the proposed guidelines would not deprive broadcasters of any speech rights that they would have in the absence of the

guidelines. Arguably, as a consequence, the processing guidelines -- at the level proposed by the Commission --do not pose any First Amendment issue, and the machinery of intermediate review and remedy-tailoring hardly needs dusting off. Put another way, given the duty of the FCC to fulfill its statutory responsibility with respect to the CTA on the occasion of a licensee's renewal, it cannot be wrong for the Commission to give guidance to broadcasters and to the staff about how its authority will be administered. The existence of a processing guideline (not any guideline, of course, but surely one so minimal), is a means of cabining Commission discretion, not extending it and, therefore, is by definition harmonious with the First Amendment regime. The proper fear for the Commission ought not to be that the guideline is constitutional, but that it becomes a ceiling, not a floor, permitting only minimal broadcaster compliance with the law.

Despite our view that, given the constitutionality of the CTA itself, the processing guideline can be seen as failing to present a constitutional question, we understand that reasonable minds can differ on this issue. Therefore, in the remaining portion of these comments, we seek to show that any such constitutional doubt can easily be resolved in favor of the validity of the guideline.

II. THE COMMISSION IS REQUIRED TO USE THE "INTERMEDIATE STANDARD" TO EVALUATE THE CONSTITUTIONALITY OF BROADCAST REGULATION

The question of the appropriate constitutional standard for

evaluating broadcast regulation has been hotly contested, but the Commission need not engage in this debate for this rulemaking. All the Commission needs to do, in fact all the Commission is permitted to do, is follow the holdings of the decisions of the Supreme Court. In its most recent ruling on broadcasters and the First Amendment, the Supreme Court reaffirmed the decades-old principle that broadcast regulation involves "unique considerations," so that even content-based regulations are upheld if they are, "narrowly tailored to further a substantial governmental interest." FCC v. League of Women Voters, 468 U.S. 364, 376, 380 (1984); see also Red Lion Broadcasting Co. v FCC, 395 U.S. 367, 389 (1969) (stating, "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary....").

Both lower courts and federal agencies are bound by these decisions. As previously noted by the Commission:

> [W]e recognize to date the Court has determined that governmental regulation of broadcast speech is subject to a standard of review under the First Amendment that is more lenient than the standard generally applicable to the print media. Until the Supreme Court reevaluates that determination, therefore, we shall evaluate the constitutionality of [broadcast regulation] under the standard enunciated in Red Lion and its progeny.

Syracuse Peace Council, 2 FCC Rcd 5043, 5048 (1987), aff'd, 867 F.2d 654 (D.C.Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

Perhaps no one has summarized the current constitutional framework for broadcast regulation more cogently and accurately

than Professor Rodney Smolla has in his book, Smolla and Nimmer on Freedom of Speech, 14-4 & 14-31 (1994):

> [F]rom a First Amendment perspective, the pattern has been relatively consistent. Generally, courts have upheld content-based regulation of speech for broadcast media, on the theory that the special characteristics of the media warrant special First Amendment treatment.
>
> ...
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> Taking all of the various threads of Supreme Court decision-making regarding the content-based regulation of broadcasting into account, it appears that the Court has now settled upon what is essentially an "intermediate" standard of review of broadcasting.

Thus, the constitutionality of any regulation under the Children's Television Act must be upheld if it passes intermediate scrutiny. The proposal of the Commission to create a "safe harbor" quantitative processing guideline is, indeed, narrowly tailored to further a substantial governmental interest.[3]

III. THE POLICIES BEHIND THE SUPREME COURT'S USE OF THE INTERMEDIATE STANDARD ARE FURTHERED BY THE COMMISSION'S PROPOSALS

Several different rationales have been given by the Supreme Court to justify its lower standard of review of broadcast regulation. The safe harbor proposed by the Commission fulfills the policies which underlie each of those Court decisions.

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[3] If the Commission were to ignore the teachings of the Supreme Court and apply "strict scrutiny," the safe harbor would still qualify as necessary for a compelling governmental interest.

A. Broadcasters, In Exchange for the Grant of One of a Limited Number of Licensees, Must Fulfill Public Interest Obligations

Broadcasters are beneficiaries of a limited number of free government licenses, which they have accepted in exchange for the imposition of public interest obligations: "A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981), quoting Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). That broadcast licenses are still "limited" in the constitutional sense is beyond question. To this day, "there are substantially more individuals who want to broadcast than there are frequencies to allocate...." Red Lion, 395 U.S. at 388. Moreover, to whatever extent "scarcity" is seen as a less pressing contemporary issue than in 1969, it is incontrovertible that current broadcasters have, "attained their present position because of the initial governmental selection in competition with others...[which] give existing broadcasters a substantial advantage over new entrants....These advantages are the fruit of a preferred position conferred by the Government." Id., 395 U.S. at 395. Accordingly, the Commission is permitted to impose public obligations on broadcasters which are consistent "with the First Amendment goal of producing an informed public capable of conducting its own affairs...." Id., 395 U.S. at 392

Requiring broadcasters to provide educational programming

for children is a paradigmatic example of a legitimate public interest obligation. The concept of "public interest" has never been limited to Fairness Doctrine-type obligations. See e.g., NBC v. United States, 319 U.S. 190, 219 (1943) (upholding the constitutionality of Chain Broadcast Regulations, as part of the Commission's "expansive" public interest power to "encourage the larger and more effective use of radio in the public interest"); FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 801 (1978) (upholding cross-ownership requirements as, "a reasonable means of promoting the public interest in diversified mass communications"); Henry v. FCC, 302 F.2d 191, 194 (D.C.Cir.), cert. denied, 371 U.S. 821 (1962) (stating, "the Commission may impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community").[4]

The Supreme Court's decision in Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445 (1994), does nothing to alter the FCC's role in protecting the public interest in broadcasting. First, there is the self-evident observation that the case only concerned the First Amendment rights of cable operators.

Second is what should be an equally obvious point: the Court's entire discussion of the scope of the Commission's authority over broadcasters was not part of any constitutional

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[4] Thus, Professor Smolla is simply incorrect when he asserts that the holding of Red Lion, "does not authorize government to impose on licensees any obligation to present certain kinds of programming beyond those limited requirements of balanced public debate...." Statement of Rodney Smolla, at 17.

review of broadcast regulation but was solely in the context of the narrow question of the reason Congress imposed must-carry requirements. See Turner, 114 S.Ct. at 2462 ("But it does not follow that Congress mandated [must carry] as a means of ensuring that particular programs will be shown, or not shown, on cable systems.")(emphasis added); Id. at 2464 ("Thus, given the minimal extent to which the FCC and Congress actually influence the programming offered by broadcast stations, it would be difficult to conclude that Congress enacted must-carry in an effort to exercise content control over what subscribers view on cable television.") (emphasis added). The Court's discussion on the scope of the FCC's broadcast regulation was not, as the NAB tries to argue, the result of "[r]eviewing its broadcast First Amendment decisions...."[5], but a description of how regulation "actually" worked at the time when must-carry was enacted.

Third, the statement extracted from Turner by the NAB purporting to "categorically reject" the Commission's authority to promulgate the children's education rules[6] was meant by the Court neither to analyze the FCC's constitutional power, nor to describe the FCC's current authority under the CTA. The statement was part of the Court's recognition that, "The FCC is well aware of the limited nature of its jurisdiction."[7] This statement was supported by reference to a 1960 FCC statement

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[5] Statement of N.A.B. at 29.

[6] Statement of N.A.B. at 29.

[7] See Turner, 114 S.Ct. at 2463.

reiterating that, "the Commission may not impose upon [broadcasters] its private notion of what the public ought to hear." Turner, 114 S.Ct. at 2463, quoting Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960). Thus, this statement is not relevant to the present inquiry. As a description of the FCC's statutory authority, it is obviously outdated by the passage 30 years later of the CTA. Moreover, the current children's programming proposals do not reflect a forbidden attempt by the Commission to impose "its private notion" but rather its obligation to implement the Congressional determination that, "as part of the obligation to serve the public interest, television stations operators and licensees should provide programming that serves the special needs of children." Congressional Findings, P.L. 101-437, Title I at 101, 104 Stat. 996(2) (Oct. 18, 1990).

If the Commission is to garner any guidance from Turner on the constitutionality of a safe harbor rule for children's educational television, it would be that the sole Court's discussion of the CTA, was in a footnote describing content-regulation of broadcast,[8] and included four other requirements, all of which the Supreme Court has upheld as constitutional: indecency, upheld in FCC v. Pacifica Foundation, 438 U.S. 726 (1978); access for federal candidates, upheld in CBS v. FCC; the personal attack rule, upheld in Red Lion; and the general public interest requirement, as upheld in United States v NBC.

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[8] See, Turner, 114 S.Ct at 2462, n.7.

These obligations do not unconstitutionally condition the receipt of a governmental benefit on the relinquishment of a constitutional right. In Rust v. Sullivan, 500 U.S. 173, 196 (1991), the Supreme Court rejected such a characterization of a ban on the discussion of abortion by doctors participating in projects receiving certain federal funds because the regulations did not force doctors, "to give up abortion-related speech; they merely require that the grantee keep such activities distinct and separate from [the funded] activities." The Court concluded that, "The government is not denying a benefit to anyone, but is simply insisting that public funds be spent for the purposes for which they were authorized." Id.

The proposed Commission rules are equally constitutional. Broadcasters are not forced to give up their speech on any topic. Moreover, under the CTA in general, and the proposed rules in particular, the Government is not denying a benefit to anyone, but is simply insisting that the public licenses be used for the public interest purposes for which they were authorized.

B. The Compelling Interest in the Well-Being of Children Justifies the Safe Harbor Proposal

The Commission's safe harbor proposal to ensure that educational programming is broadcast for children serves the Government's compelling interests in both the "well being of its youth" and in supporting the "parents' claim to authority in their own household." Ginsberg v. N.Y., 390 U.S. 629, 639-40 (1968). Especially in the broadcast context, these interests have been held to justify, "the regulation of otherwise protected

expression." Pacifica, 438 U.S. at 748.

The channeling of indecent broadcasts was upheld by the Supreme Court in large part because, "broadcasting is uniquely accessible to children...." Pacifica, 438 U.S. at 749.[9] But the unique accessibility of broadcasting can cause other harms to children. For example, exposure to excessive commercials has been found to threaten children's well-being. See e.g., 47 U.S.C. § 303(a) (limiting advertising in children's programming). Similarly, the FCC has a long record before it of the harm to children, who watch many hours of television a day, of seeing nothing that can honestly be described as "educational" for all that time. The safe harbor proposal represents a modest attempt to avoid the harm.

Perhaps most important, the proposal serves to aid parents who wish to have their children avoid the harm of countless hours in the vast wasteland. The Supreme Court has frequently recognized that "parents and others, teachers for example, who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Sable Communications of California, Inc. v.

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[9] This part of the Pacifica opinion, Part IV-C, was a majority opinion, expressing a holding of the Supreme Court. Professor Smolla's statement that Pacifica was "a mere plurality opinion," is imprecise, because the only parts of Justice Stevens' opinion which were not the opinion of the Court, Parts IV-A and IV-B, do not focus on broadcast regulation at all, but rather on whether the First Amendment protection for indecency, irrespective of the media involved, should be "the same" as for other protected speech. See Statement of Rodney Smolla, at 18 & n.10.

FCC, 492 U.S. 115, 126 (1989); see also Pacifica, 438 U.S. at 749; Ginsberg, 390 U.S. at 641. The current FCC proposal provides just such support.

This support for parents and children is not limited to preventing one sort of harm -- indecent programming. The NAB asserts that "the Commission cannot base affirmative programming obligations on cases that recognize the government's interest in protecting children from harmful speech....[Professor] Smolla notes that Pacifica 'provides no support for affirmative requirements imposing on broadcasters actual obligations to reach children with certain defined types of programming.'" Statement of NAB at 30 (quoting Statement of Smolla at 18).

In actuality, though, a long line of Supreme Court cases, including Pacifica, should be read as being precisely in support of such affirmative requirements. As Professor Smolla himself wrote in his treatise:

> This emphasis in Pacifica on children connects with parallel rulings in other areas of First Amendment jurisprudence. On a number of occasions, the Supreme Court has applied what might be called the "Child's First Amendment," permitting regulation of speech implicating children in ways that would be impermissible for adults. There are two principal justifications for creating a Child's First Amendment, one relating to the role of teaching children, the other to sheltering them.

Smolla and Nimmer on Freedom of Speech at 14-27, 14-28 (1994).

The Child's First Amendment would surely support the FCC's limited attempt to use the safe harbor provision in the role of teaching children. As the Supreme Court has noted: "A democratic

society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Prince v. Massachusetts, 321 U.S. 158, 168 (1944)

It should be pointed out that the safe harbor proposal is much less intrusive on competing First Amendment interests than the indecency rules. Most particularly, the indecency rules limit what adult viewers can see for most of the day. Even while upholding the current rules, the Court of Appeals acknowledged that, "the restrictions burden the rights of many adults...." Action for Children's TV, Inc. v. FCC, 58 F.3d 654, 667 (D.C.Cir. 1995). By contrast, the safe harbor provisions will not burden adult viewers at all. There can be no claim that they limit adults to watching programming acceptable to children; all that the provisions require is that a small portion of the programming already designed for children be educational rather than mindless.

IV. THE PROPOSED SAFE HARBOR PROVISIONS ARE CONSISTENT WITH BOTH THE LANGUAGE OF THE CTA AND ITS LEGISLATIVE HISTORY

The Commission's safe-harbor proposal is a permissible implementation of the plain language directives issued by Congress in the CTA. Moreover, even if legislative history can be used to clarify unambiguous language, that history does not foreclose the proposal.

The CTA directs the FCC at license renewal time to "consider the extent" to which a broadcast licensee has "served the educational and informational needs of children though the

licensee's overall programming, including programming specifically designed to serve such needs." 47 U.S.C. §303(a)(2). A safe harbor quantitative processing guideline is simply a mechanism that will enable the Commission to perform that consideration. The Commission is merely enabling both itself and licensees to make that determination easily. Broadcasters who wish to find other ways to fulfill their obligation would be exactly as free as they are under the current regulations.

The legislative history does not foreclose the FCC from utilizing the processing guidelines. Most critical is Representative Markey's statement that, "The bill provides the Commission broad discretion, during the licensing process, in reviewing a station's commitment to children's educational and informational programming." 136 Cong. Rec. H8536-H8537 (daily ed. Oct. 1, 1990) (remarks of Rep. Markey) (emphasis added). The current proposals are well within the broad discretion afforded the Commission.

The NAB asserts that Professor Smolla concluded that the sponsors of the CTA, "repeatedly stated that they did not intend that the FCC impose rules requiring specific quantities of particular types of programming." Statement of NAB at 32. Professor Smolla reached no such conclusion, because the Act's sponsors made no such statements.

Professor Smolla does include his paraphrase of Representative Markey's statement, "Congressman Markey in his

remarks stated that 'instead' of requiring promulgation of quantitative guidelines, the Act 'requires' the Commission to base its assessment on a licensee's 'overall' performance." Statement of Prof. Smolla at 32 (emphasis in original). The full sentence spoken by Representative Markey reveals that Congress was not limiting the discretion bestowed on the Commission. The full statement reads: "The legislation does not require the FCC to set quantitative guidelines for educational programming, but instead, requires the Commission to base its decision upon an evaluation of a station's overall service to children." 136 Cong. Rec. H8536-H8537 (daily ed. Oct. 1, 1990) (remarks of Rep. Markey).

The plain meaning of this complete statement is simply that the FCC does not have to set quantitative guidelines under the CTA. However, if the Commission found that such guidelines were needed for fulfilling its obligation of making an evaluation of a station's overall service to children, neither Representative Markey nor any of the other sponsors of the CTA, would prohibit their use.

Ultimately, the FCC must be able to make its evaluation of a station's overall children's programming effectively. If the Commission cannot do its job, the CTA is a dead letter. Such a empty promise was never intended by Congress. As one supporter of the CTA stated, "Of course, TV stations already are required to serve their child audiences. But now, the FCC will be directed to gauge whether TV stations are actually meeting that

obligation." 136 Cong. Rec. H8536, 8541 (Oct. 1, 1990) (remarks of Rep. Lent) (emphasis added).

If the Commission concludes that a safe harbor provision will help it gauge whether broadcasters are actually meeting their obligation to children, the promulgation of such a provision will be in harmony with both the plain language of the CTA and its legislative history.

V. THE PROPOSED GUIDELINES HAVE BEEN "GRADUALLY TAILORED" TO PERMIT THE COMMISSION TO FULFILL ITS STATUTORY OBLIGATION WITH A MINIMUM OF INTRUSION INTO BROADCASTERS' PROGRAMMING DISCRETION

Finally, we address the question of tailoring. We believe that the proposed guideline is the narrowest possible to achieve the objectives of the CTA. But it is not even necessary that so high a hurdle be cleared. The requirement of narrow tailoring is satisfied "so long as the ...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989). It is not fatal that the NAB can come up with a narrower remedy (two hours per week, rather than three or a case-by-case test rather than a guideline) or "some imaginable alternative that might be less burdensome...." United States v. Albertini, 472 U.S. 675, 689 (1985). As the Supreme Court stated last term:

> What our decisions require, instead, is a 'fit' between the legislature's ends and the means chosen to accomplish those ends' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not

> necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (internal quotations omitted); see also Burson v. Freeman, 504 U.S. 191, 211 (1992) (contains common-sensical reference to the relevance of "simple common sense" even in a context closer to the strict scrutiny test).

The remedy fashioned by the FCC -- here the "processing guideline" -- is narrowly tailored to the harm to be prevented and the interests to be served. The inquiry for this rule is different from most cases. Normally, the question of narrow tailoring is asked prospectively: a proposed intervention is compared by the Court to other, imagined interventions that might be less intrusive.

Here, however, the question is an easier one. The Commission has already instituted the very least restrictive alternative possible under the CTA. The Commission then built a record determining the nature of broadcaster performance.

The Commission has laid out a range of additional interventions, each with its own characteristics of narrowness. The consequence is a policy of what we would call "gradual tailoring:" the careful adjustment, on the basis of a record, to determine the appropriate, and most circumscribed, relationship between the agency required to implement a law and the industry which bears the duty to carry it out. Under the proposed guidelines, the Commission is acting to ratchet up its approach

only after determining, on the basis of a substantial and comprehensive experiment, that its previous approach did not achieve Congressional objectives.

The Commission noted several times that the studies presented to it and its own analyses demonstrate that "any increase in the amount of [the signified children's programming] being aired since passage of the CTA has been modest at best and that some further action on [the part of the FCC] is warranted." Notice at 6335, ¶ 52.

It is only against this record that the Commission is shaping a less narrow remedy, a step on the ladder of concern caused by the industry failure to obey the law. If the Commission were to continue along its existing track, either the compelling interests set forth by Congress would have to be abandoned, or license renewals suddenly would have to be questioned, without notice and in an arguably unpredictable fashion.

In 1991, the Commission adopted its first Report and Order,[10] and, after reviewing more than 300 license renewals, began the inquiry which would lead to a revision of rules. The Commission's proposed guidelines are a model of gradual tailoring.

The narrowness of the rule is also reflected in its reliance on broadcaster discretion to identify educational objectives to

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[10] In re Matters of Policies and Rules Concerning Children's Television, Report and Order, 6 FCC Rcd 2111 (1991).

be pursued and lessons to be taught. It is not the Commission which is creating a national curriculum. Each broadcaster is free to teach its own lesson. The guidelines, therefore, do not in any way "reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." Turner, 114 S. Ct. at 2467. There is no favored speaker; the speaker, indeed, remains the broadcaster.

Ultimately, under the tests established by the Supreme Court, the specifics of the processing guideline -- and their relationship to the renewal process -- are important factors in determining the validity of the entire scheme. If the CTA, as we believe, is constitutional, a mechanism that provides a reward, in terms of administrative ease, for those who come within a "safe harbor" is different from one that is structured as a threat to those who do not. Here, under our assumptions, the process of renewal -- with its wide-ranging inquiry under the CTA -- can be designated the norm. Resort to the norm is not a threat to those outside the safe harbor; rather, as we understand the operation of the guideline, it is a facilitating benefit to those who would otherwise have to withstand that agency examination.

As set forth by the Commission, compliance with the guidelines is but one of a multiplicity of alternatives open to the broadcaster. If the Commission were so to administer the "safe harbor" that it was the only harbor, or that the notion of

guidelines, as opposed to standards, was an illusion because of narrow enforcement, then a constitutional question might be presented. But as the Commission has explained its administration in the Notice, adoption of the "safe harbor" regulation is not an intervention sufficiently coercive to be an abridgment of speech. Indeed, as we suggest above, the specific guideline proposed is hardly the kind of intervention that triggers scrutiny at all.

Commissioner Chong, in a recent speech to Women in Cable and Telecommunications, sought ways of broadening any FCC action to increase broadcaster responsibility, minimizing quantitative requirements.[11] The guideline approach, as compared to the standards approach, does this. Future tailoring could also be furthered by declaratory judgments which could take into account additional factors, many of which are listed in the CTA itself or in the Notice. For example, while a simple guideline (one hour per day or three hours per week, all between 6 a.m. and 11 p.m.) lends itself to ease of administration, declaratory judgments might include more factors. Among the elements to be included in such declaratory judgments that would make the total approach more flexible would be: a) recognition of other programming "specifically designed to serve" educational and informational needs of children in the market; b) some weighting reflecting time of day for broadcasting and the number of children in the

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[11] See Commissioner Rachelle Chong, Remarks to Women in Cable and Telecommunications, "Women Being Heard and in Command: Making it Happen" (Oct. 30, 1995).

audience at a particular time; and c) honoring special nonbroadcast efforts by the licensee including support for other licensees in the market.[12] If the harm to be remedied (or the government interest to be served) relates to the educational and informational needs of children, then a guideline should not provide incentives for stations (or time parts) when few children watch, nor leave markets bereft of programming where there are many children-viewers. Further, a decision to alter the guideline in the future by increments (up to five hours as suggested) should be supported, not by industry practice, but by its relationship to the substantial interest that is being served.

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[12] For example, an exemplary level of support of public broadcasting in the community might, in some readings of the statute, suffice for CTA clearance of the renewal hurdle. In New York City, an effort by the commercial channels, working together, to convert Channel 25, the broadcast licensee of the New York City Board of Education, into a model children's channel would, under this approach, could serve, itself, as a safe harbor.

VI. CONCLUSION

For the reasons stated, it is our opinion that the Commission's proposed processing guideline is constitutional.

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